IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-71-1985—RFP

ROBERT E. MARSHALL, PETITIONER

v.

J. J. PARKER, Warden, RESPONDENT

ORDER PERMITTING ACTION TO BE FILED IN FORMA PAUPERIS AND APPOINTING COUNSEL, AND ORDER TO SHOW CAUSE

* * * *

Defendant herein has filed a petition pursuant to 28 U.S.C. § 2255 to modify his sentence to ten years in prison for violation of 18 U.S.C. § 2113 (a), which sentence was imposed by this Court on February 9, 1971 after defendant pleaded guilty.

Affidavit having been presented in compliance with the provisions of 28 U.S.C. § 1915

IT IS ORDERED that the Clerk file said affidavit and the petition, without prepayment of the Clerk's filing fee, or the giving of security therefor.

Based upon the petition filed herein and good cause appearing;

IT IS ORDERED that Respondent file a return with this Court on or before the 3rd day of November 1971, to show cause, if any there be, why the petition should not be granted herein;

IT IS FURTHER ORDERED that the Clerk of this Court forthwith serve a copy of this Order upon Respondent as well as upon Petitioner and his counsel as appointed *infra*, and also serve a copy of the petition and of this Order upon official counsel for Respondent, and that Respondent serve a copy of the return upon Petitioner and his counsel as appointed *infra* prior to the filing thereof;

IT IS FURTHER ORDERED that if Petitioner files a traverse to the return, Petitioner shall do so prior to the date next below specified;

IT IS FURTHER ORDERED that Mr. James Hewitt, United States Public Defender, serve as counsel for Petitioner in this proceeding; and

IT IS FURTHER ORDERED that Respondent or counsel for Respondent appear in person before this Court on the 15th day of November 1971, to complete compliance with this Order to Show Cause.

Dated: October 8, 1971

/s/ Robert F. Peckham
United States District Judge

JAMES L. BROWNING, JR.
United States Attorney

JAMES L. HAZARD
Assistant United States Attorney

450 Golden Gate Avenue
16th Floor, Federal Building
San Francisco, California 94102
Telephone: 556-4228

Attorneys for Respondents.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Filed Dec. 10, 1971, C. C. Evensen, Clerk]

Civil Number 71-1985—RFP

ROBERT E. MARSHALL, PETITIONER

vs.

UNITED STATES OF AMERICA and
J. J. PARKER, WARDEN, RESPONDENT

RESPONSE OF UNITED STATES OF AMERICA TO PETITIONER'S MOTION TO VACATE SENTENCE PURSUANT TO TITLE 28 USC § 2255

We respectfully request that Robert E. Marshall's petition to vacate sentence pursuant to Title 28 U.S.C. § 2255 be denied. Petitioner alleges that he was unconstitutionally deprived of the benefits of the Narcotic Addict Rehabilitation Act of 1966, Title 18 U.S.C. § 4251, 4252, 4253, and prays that his sentence be vacated under Title 28 U.S.C. § 2255.

Petitioner was sentenced to a ten year term by the District Court for the Northern District of California for violation of Title 18 U.S.C. § 2113(a), to wit: entering a bank with the intent to commit a felony. (R.T., p. 9, 18:24).

Petitioner at PB2; 13-21 argues that the sole reason the Court gave for not sentencing petitioner under the Narcotic Addict Rehabilitation Act was that petitioner was not an "eligible offender" in accord with Title 18 U.S.C. § 4251(f)(4). Title 18 U.S.C. § 4251(f)(4) excludes from coverage:

> "an offender who has been convicted of a felony on two or more occassions."

The Court according to petitioner, would not follow the "plea bargained" recommendation of counsel, and instead sentenced petitioner to 10 years in the Federal Penitentiary. (PB2:17-21).

The gravaman of petitioner's argument is the classification defined by Congress at Title 18 U.S.C. § 4251(a)(4) is unreasonable and a violation of petitioner's Fifth Amendment right to Equal Protection. Petitioner in challenging the constitutionality of Title 18 U.S.C. § 4251(a)(4) has relied almost entirely on *Watson* vs. *United States*, 439 F.2d 442, 457, (D.C. Cir., 1970). Petitioner's reliance on *Watson, supra*, is misplaced. The difference between *Watson, supra* and the instant case is manifest.

Petitioner at PB2-3:31-32, 1-5, in citing *Watson, supra*, as authority omitted the following language from that portion of the *Watson, supra*, opinion.

> "Certainly when those two prior convictions are possible upon a mere showing by the Government of an addict in possession, we think the discrimination between the two classes of addicts is constitutionally unacceptable.

Petitioner had previously been convicted of burglary in 1958; of burglary and possession of a firearm by an ex-felon in 1960; and of forgery in 1969. Those convictions required far more than "a mere showing of an addict in possession. . .",

The *Watson* court reviewed the legislative history of NARA and stated:

> "The Senate and House versions of the Act differed on this exclusion from eligibility of those having two prior felony convictions, with the Senate enactment having no such provision. There were many expressions on the Senate floor as to the undesirability of excluding from the rehabilitative reach of the bill the large class of addicts who would have two prior convictions. The House bill prevailed on this point in conference. The conference report says only that the Senate conferees "felt it reasonable to exclude hardened offenders with serious criminal records. * * *"
>
> Both House and Senate were initially in accord on the exclusion of an offender convicted of a crime of violence. The two-prior-felony exclusion is not, however, limited to convictions for crimes involving violence. Thus, an addict having two prior felony convictions for securities fraud would not be eligible for disposition under the Act. When this provision was criticized on the House floor as likely to "exclude from coverage precisely those addicts who most need medical treatment and rehabilitation services," a defender, who later served on the conference committee, said that the Act was designed to help "the narcotic addict who is secondarily guilty of some sort of minor or nonviolent offense."
>
> (Emphasis supplied.) Upon this rationale, it appears utterly illogical, in terms of the Act's purposes, not to restrict, at the least, the exclusion to prior crimes involving violence.
>
> (439 F. 2d at 456 PN 19).

It is quite clear that *Watson* is meant to be limited to the particular facts of that case. Petitioner's prior felony convictions were not for narcotic offenses. Watson stood convicted of a violation of the Harrison Narcotic Act, Title 26 U.S.C. § 2553 *et seq* and his priors were convictions under the same statute.

If Congress has determined that certain offenders should not be mixed with narcotics addicts who have not committed two or more prior felony convictions so that the latter maybe more readily rehabilitated, then it cannot be said that Congress has acted arbitrarily.

On the basis of the foregoing, we respectfully submit that the petition be denied.

Dated: December 10, 1971.

Respectfully submitted,

JAMES L. BROWNING, JR.
United States Attorney
/s/ James L. Hazard
Assistant United States Attorney

[Certificate of Service by Mail (Omitted in Printing)]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-71 1985—RFP

[Filed Feb. 3, 1972, C. C. Evensen, Clerk]

ROBERT E. MARSHALL, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL., RESPONDENTS

ORDER

Pursuant to 28 U.S.C. § 2255, petitioner has asked that his sentence be vacated. Petitioner is currently serving a ten year sentence imposed by this Court for violation of 18 U.S.C. § 2113(a), entering a bank with the intent to commit a felony.

Petitioner claims that he should have been sentenced as a drug addict pursuant to the narcotic Addict Rehabilitation Act of 1966, 18 U.S.C. §§ 4251-53, despite the fact that the statute excludes from eligibility "an offender who has been convicted of a felony on two or more occasions." 18 U.S.C. § 4251(f)(4). At the time he was sentenced, petitioner had previously been convicted of at least one felony.

Essentially, petitioner's claim is that it violates the Fifth Amendment due process clause for the Narcotic Addict Rehabilitation Act to distinguish between addicts who have prior felony convictions and those who do not. In *Watson* v. *United States*, 439 F.2d 442 (D.C. Cir. 1970), the court did find such a distinction arbitrary where the prior felony convictions were for possession of narcotics. In the instance case, however, petitioner's prior convictions were for burglary, forgery, and possession of a firearm. And while it is at least arguable that the reasoning of *Watson* should be extended to any prior felony convictions resulting directly from the defendant's drug addiction, petitioner's appointed counsel in the instant case has not shown that he may be able

to prove such a direct connection between petitioner's addiction and his criminal activities.

Accordingly, this Court finds that Congress did not act arbitrarily in arranging to rehabilitate convicted drug addicts in a setting apart from convicts with histories of prior felony convictions. And petitioner's motion to vacate his sentence is hereby DENIED.

Dated: Feb. 3, 1972.

/s/ Robert F. Peckham
United States District Judge

JAMES F. HEWITT
Federal Public Defender

FRANK R. UBHAUS
Assistant Federal Public Defender

450 Golden Gate Avenue
San Francisco, California
Telephone: 556-7712

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

C-71-1985

ROBERT E. MARSHALL, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL., RESPONDENT

NOTICE OF MOTION AND MOTION TO VACATE ORDER AND TO REOPEN HEARING

TO: The United States of America, Respondent, and James L. Browning, Jr., Attorney for Respondent.

PLEASE TAKE NOTICE that on February 18, 1972, at the hour of 10:00 a.m., or as soon thereafter as counsel can be heard, Robert E. Marshall, petitioner above named, will move the Honorable Robert F. Peckham, United States District Court Judge for the Northern District of California for an order vacating the order of February 3, 1972, denying petitioner's application under Title 28 U.S.C. § 2255, and for an order reopening the hearing on petitioner's application.

This motion is made on the ground that testimony of Robert E. Marshall and others will be necessary to establish the connection between the petitioner's prior criminal record and his narcotic addiction.

This motion is based on the attached affidavit of Frank R. Ubhaus, counsel for petitioner, the files and records

in this case and any further matter which may appear at the hearing on this motion.

DATED: February 9, 1972

Respectfully submitted,

JAMES F. HEWITT
Federal Public Defender
/s/ Frank R. Ubhaus
Assistant Federal Public Defender

JAMES F. HEWITT
Federal Public Defender
FRANK R. UBHAUS
Assistant Federal Public Defender
450 Golden Gate Avenue
San Francisco, California 94102
Telephone: 556-7712

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

C-71-1985

ROBERT E. MARSHALL, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL., RESPONDENT

AFFIDAVIT OF FRANK R. UBHAUS

I, Frank R. Ubhaus, being duly deposed and sworn, declare the following:

1. That I represent Robert E. Marshall, petitioner above named.
2. That I have received a copy of the Court's Order in the above entitled action denying petitioner's application for relief under the provisions of Title 28 U.S.C. 2255.
3. That the Court's Order appears to deny the petition primarily on the ground that the petitioner's counsel "has not shown that he may be able to prove such a direct connection between petitioner's addiction and his criminal activities."
4. That I believe such a connection exists, and further that, at the hearing on this application, I requested an opportunity to bring the petitioner to San Francisco to testify regarding his narcoties addition; this request was not granted.
5. That testimony of this petitioner and possibly other witnesses will be necessary to demonstrate to the Court

the nexus between the petitioner's prior criminal record and his narcotic addiction.

6. That I make this affidavit in support of the Motion To Vacate And To Reopen The Hearing in this matter and for the purpose of presenting to the Court sufficient evidence to establish the nexus referred to in Paragraph 5, supra, and in the Court's Order.

DATED: February 9, 1972

/s/ Frank R. Ubhaus

Subscribed to and sworn to before me this 9th day of February 1972.

C. C. EVENSON
Clerk of the United States District Court

/s/ S. Douglas
Deputy Clerk

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-1479

[Filed Nov. 15, 1972, Dennis R. Mathews, Clerk, U. S. Court of Appeals]

ROBERT EDWARD MARSHALL, PLAINTIFF-APPELLANT

vs.

J. J. PARKER, Warden, UNITED STATES OF AMERICA, DEFENDANTS-APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Before: BARNES and TRASK, Circuit Judges, and BATTIN, District Judge.*

TRASK, Circuit Judge:

On February 4, 1971, Robert Marshall, appellant, was sentenced to ten years imprisonment following his plea of guilty of the offense of entering a bank with the intent to commit a felony in violation of 18 U.S.C. § 2113 (a). There was a recommendation that he receive treatment for his narcotic addiction. On October 15, 1971, he filed a petition *in propria persona* pursuant to 28 U.S.C. § 2255 to vacate that sentence as illegal.[1] Following appointment of counsel and oral argument on the petition it was denied on February 3, 1972, and this appeal is from the order of denial.

It was the contention of appellant in his Section 2255 petition that the sentencing court erroneously denied him consideration for treatment as a narcotic addict under

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* Hon. James F. Battin, United States District Judge, for the District of Montana, sitting by designation.

[1] We treat the Section 2255 petition as a motion for correction of an illegal sentence under Rule 35, Fed. R. Crim. P., *Brooks* v. *United States*, 457 F.2d 970 (9th Cir. 1972).

Title II of the Narcotic Addict Rehabilitation Act of 1966 (NARA), 18 U.S.C. §§ 4251-4255.[2] The order of the trial court denying the petition apparently relied on 18 U.S.C. § 4251(f)(4) which excludes from the coverage of the Act, ". . . an offender who has been convicted of a felony on two or more occasions." The court noted in its order that appellant had a record of prior convictions for burglary, forgery, and possession of a firearm.

Before the trial court and here, appellant relies upon decisions of the Court of Appeals of the District of Columbia which hold that the two prior felony exclusion of Section 4251(f)(4) is unconstitutional under the equal protection concept embodied in the Due Process Clause of the Fifth Amendment. *Watson* v. *United States*, 439 F.2d 442, 457 (D.C. Cir. 1970), and the cases which have followed it,[3] *United States* v. *Williams*, 442 F.2d 738 (D.C. Cir. 1970); and *Chicquelo* v. *United States*, 452 F. 2d 1316 (D.C. Cir. 1971). Because the two prior felony convictions in *Watson* were for violations of narcotics laws there was some conjecture that the rationale of that case was limited to like facts. It now appears that such is not the case, *United States* v. *Hamilton*, 462 F.2d 1190 (D.C. Cir. 1972), and that any two prior felony convictions are within the intendment of the *Watson* rule of unconstitutional exclusion.[4]

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[2] Title II applies to those classified under the Act as "eligible offenders" constituting addicts who have been convicted of an offense against the United States and are otherwise eligible for treatment looking to rehabilitation in lieu of punishment for crime. See n.6 *infra*.

[3] The problem posed by *Robinson* v. *California*, 370 U.S. 660 (1962), of conviction and punishment because of the "status" of being an addict is not presented here either directly on the record or tangentially as the *Watson* court considered it. Appellant relies principally upon Part IV of the *Watson* opinion. 439 F.2d at 454.

[4] In *Hamilton* the court assumes three possible justifications for the two prior felony disqualification and rejects each under the equal protection argument. The first assumption rejected is that the two prior felony disqualification eliminates those who are not likely prospects for rehabilitiation. This rejection is based upon *Watson*. That case, however, dismisses the classification because

We do not agree that Congress in enacting Title II of the NARA may not constitutionally limit the persons eligible to receive its benefits as it has seen fit to do.

Let us first consider the Act itself. Title I,[5] 28 U.S.C. §§ 2901-2906, provides for civil commitment and rehabilitation of narcotic addicts charged with an offense but prior to prosecution. Under it if the district court believes that an eligible person is an addict, the court may advise him that the prosecution of the criminal charge will be held in abeyance if he elects to submit to an immediate examination to determine whether he is an addict *and is likely to be rehabilitated through treatment.* If the election is made and he is found qualified, he will be civilly committed to the Surgeon General for treatment. If the treatment is successful over a period of three years the criminal charge will be dismissed, but if not, prosecution will be resumed. Provision is also made for supervisory aftercare.

Title II, 18 U.S.C. §§ 4251-4255, with which we are here concerned, encompasses treatment of an individual who has been convicted of an offense against the United States. If the court believes that an eligible offender[6]

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it was not contemplated by a Presidential Commission Report and because the disqualification is at odds with what the court understands Congressional purpose to be. 439 F.2d at 456. While not disagreeing that the purpose of the Act is rehabilitation, we are unable to discern Congress' purpose with respect to the two prior felony exclusion as being any different than what Congress plainly says it to be. Nor does this classification defeat the Congressional purpose. For the same reason we reject any distinction based upon post 1966 felony convictions as opposed to prior 1966 felony convictions.

[5] Public Law 89-793; 80 Stat. 1438 should be consulted for an overview since it is the only source where all three titles of the NARA are found together.

[6] 18 U.S.C. § 4251(f) states in pertinent part:

"(f) 'Eligible offender' means any individual who is convicted of an offense against the United States, but does not include—

"(1) an offender who is convicted of a crime of violence.

"(2) an offender who is convicted of unlawfully im-

under that title is an addict, the court may place him in the custody of the Attorney General for an examination to determine whether he is an addict and is likely to be rehabilitated through treatment. If so, he may be committed to the Attorney General for treatment for an indeterminate sentence not to exceed ten years, or the maximum sentence that could otherwise be imposed.

Title III, 42 U.S.C. §§ 3411-3426, provides for civil commitment of persons not charged with any criminal offense. This procedure is initiated by an addict who desires treatment, or by a related individual. A petition may be filed in the United States District Court to commit such person to the Surgeon General for treatment in a hospital of the Public Health Service. Again, it must be determined that he is a narcotic addict "*who is likely to be rehabilitated through treatment.*"

In Title III of the Act, 42 U.S.C. §§ 3411-3426, we find no exclusion based upon prior conviction. 42 U.S.C. § 3412 provides: "(a) Except as otherwise provided in section 3421 of this title, whenever *any* narcotic addict desires to obtain treatment for his addiction . . ." a petition may be filed. (Emphasis supplied).

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porting or selling or conspiring to import or sell a narcotic drug, unless the court determines that such sale was for the primary purpose of enabling the offender to obtain a narcotic drug which he requires for his personal use because of his addiction to such drug.

"(3) an offender against whom there is pending a prior charge of a felony which has not been finally determined or who is on probation or whose sentence following conviction on such a charge, including any time on parole or mandatory release, has not been fully served: *Provided*, That an offender on probation, parole, or mandatory release shall be included if the authority authorized to require his return to custody consents to his commitment.

"(4) an offender who has been convicted of a felony on two or more prior occasions.

"(5) an offender who has been committed under title I of the Narcotic Addict Rehabilitation Act of 1966, under this chapter, under the District of Columbia Code, or under any State proceeding because of narcotic addiction on three or more occasions." (Emphasis in original).

42 U.S.C. § 3421 then states: "The provisions of this subchapter shall not be applicable with respect to any person against whom there is pending a criminal charge, whether by indictment or by information, which has not been fully determined or who is on probation or whose sentence following conviction on such a charge, including any time on parole or mandatory release, has not been fully served, except that such provision shall be applicable to any such person on probation, parole, or mandatory release if the authority authorized to require his return to custody consents to his commitment."

It appears from these statutory sections that a narcotic addict with two or more prior felony convictions would not be excluded from treatment of his addiction under Title III of the NARA, unless there was a criminal charge pending against him at the time he petitioned. This is evidence that Congress did not intend to totally exclude persons within the class of twice-prior-convicted felons from rehabilitation treatment, but rather, in light of the overall purpose of rehabilitation, Congress wanted to assure that the program was entered into with a sincere, good-faith desire for treatment and not with a motive merely to escape criminal punishment.

Thus, in each of the three titles, *i.e.*, Title I applying to addicts charged with a criminal offense, Title II applying to those convicted, but not yet sentenced and, Title III applying to those not charged with a criminal offense, the reach of the Act is to those who are not only addicts but also "*are likely to be rehabilitated through treatment.*" This is consistent with the declared policy of Congress in enacting this legislation that:

> "It is the policy of the Congress that certain persons charged with or convicted of violating Federal criminal laws, who are determined to be addicted to narcotic drugs, *and likely to be rehabilitated through treatment*, should, . . . be civilly committed for confinement and treatment designed to effect their restoration to health, and return to society as useful members.

> "It is the further policy of the Congress that certain persons addicted to narcotic drugs who are not charged with the commission of any offense should be afforded the opportunity, through civil commitment, for treatment, in order that they may be rehabilitated and returned to society as useful members and in order that society may be protected more effectively from crime and delinquency which result from narcotic addiction." 42 U.S.C. § 3401; 1966 U.S. Code Cong. & Adm. News at 1670. (Emphasis supplied).

The Act treats each of these three categories a little differently as to the length of treatment and procedures for obtaining it, but in each it applies to those addicts likely to be rehabilitated. Congress could, it is submitted, have broadened the scope of the Act to addicts "who by any possibility" might be rehabilitated through treatment, and pursuant to that policy have eliminated all or almost all exclusions to eligibility. It did not see fit to do so although the legislative history indicates that it had the technical advice and resources of the Attorney General of the United States, the Surgeon General of the Public Health Service, the Director of the Bureau of Prisons of the Department of Justice, and the enforcement officials of the Secretary of the Treasury, in drafting the legislation. It may be fairly presumed, therefore, that the classifications as to eligibility were both considered and felt to be logically suited to the purposes which Congress sought to obtain by the enactment.

Dunn v. *Blumstein*, 405 U.S. 330 (1972), tells us that:

> "To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." 405 U.S. at 335.

It is clear that standards used for the purpose of evaluating classifications and justifications for them vary in accordance with the interests affected. 405 U.S. at 335,

n.6. In *Dunn* v. *Blumstein*, *supra*, where the fundamental right to vote was granted to some citizens and denied to others, the Court was required to determine whether the exclusions were necessary to promote a "compelling" state interest. 405 U.S. at 337. *See also*, *Shapiro* v. *Thompson*, 394 U.S. 618, 629, 631 (1969).

Similar concern becomes necessary where distinctions are based upon wealth or race. *McDonald* v. *Board of Education*, 394 U.S. 802 (1969); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966); *Douglas* v. *California*, 372 U.S. 353 (1963).

Here there is no suspect classification based upon wealth or race, nor can we believe that one who becomes addicted to narcotics has a "fundamental right" to rehabilitation at public expense. That being true we consider the constitutional question from the standpoint of the normal standard used in determining the validity of equal protection claims. Thus reasonable classifications of persons may be made and each class dealt with differently if there is some relevance to the basic purpose for which the classification is made. *Baxstrom* v. *Harold*, 383 U.S. 107 (1966). As the Court said in *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955):

> "Evils in the same field may be of different dimensions and proportions, requiring different remedies. . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others. . . . The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

Accord, *Jefferson* v. *Hackney*, 406 U.S. 535, 546 (1972).

NARA has as its basic purpose the treatment of narcotic addicts who are likely to be rehabilitated through that treatment.[7] Standards of eligibility may well have

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[7] "The committee has carefully considered this legislation and in recommending it finds that it provides the flexibility to enable Federal authorities to treat the unfortunate addict who is

been developed by the experts in the field with an eye toward restricting eligibility in the beginning to those most likely to be rehabilitated and who would appear to bring to the program the greatest promise for its success, consistent with time, money, trained personnel and facilities which the Congress believed were available for it. For these reasons (or others) the Congress might well have established a policy to exclude, at least at the start, those whose known criminal careers made them undue risks for rehabilitation, and undue risks to the success of the program and to others in it.

Opinions might differ as to where the lines should be drawn. Some might raise the limits of eligibility by admitting those with a record of only one prior conviction for a crime of violence and raising the exclusion based on prior felonies from two to five and eliminating prior narcotics counts from the standard. Congress chose, for reasons which we cannot determine to be arbitrary, to establish the lines of eligibility where we now find them. Here the Congress is not depriving citizens of rights which they have always held and rights which are fundamental to them as members of our society. The court in *Watson* would simply extend the program farther. So might we, were we acting in a legislative capacity. As noted by the Court in *Jefferson* v. *Hackney*, *supra*:

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capable of rehabilitation to render assistance in a manner which will enable him to extricate himself from an otherwise hopeless and repititious pattern of addiction and crime. The procedures provided by the bill in titles I, II, and III, do not essentially change the authority being exercised by law enforcement officials or the courts in dealing with persons charged with criminal offenses or convicted of such offenses. Rather the bill provides alternatives which provide a needed flexibility in the law. The practical effect of the implementation of the law provided for in the bill, is that strict punishment can be meted out where required to the hardened criminal, while justice can be tempered with judgment and fairness in those cases where it is to the best interest of society and the individual that such a course be followed." H.R. Rep. No. 1486, 89th Cong., 2d Sess.; 1966 U.S. Code Cong. & Adm. News at 4250.

> "This Court emphasized only recently, in *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970), that in 'the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.' A legislature may address a problem 'one step at a time,' or even 'select one phase of one field and apply a remedy there neglecting the others.' *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955). So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket."

We cannot find in the context of this Act and its standards of eligibility anything departing from the rational or any discrimination which may be considered "invidious." Judgments may differ, but considered differences of opinion as to proper bounds of legislative action do not amount to irrational conduct. As Justice Black said in concurring in *Powell* v. *Texas*, 392 U.S. 514, 539-40 (1968), where the Court labored over the impossible complexities of the criminal law as applied to alcoholism:

> "Even the medical authorities stress the need for continued experimentation with a variety of approaches. I cannot say that the States should be totally barred from one avenue of experimentation, the criminal process, in attempting to find a means to cope with this difficult social problem. From what I have been able to learn about the subject, it seems to me that the present use of criminal sanctions might possibly be unwise, but I am by no means convinced that *any* use of criminal sanctions would inevitably be unwise or, above all, that I am qualified in this area to know what is legislatively wise and what is legislatively unwise." (Emphasis in original).

The judgment is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 72-1479

ROBERT EDWARD MARSHALL, PLAINTIFF-APPELLANT

vs.

J. J. PARKER, Warden, UNITED STATES OF AMERICA,
DEFENDANTS-APPELLEES

JUDGMENT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

[SEAL]

A TRUE COPY
ATTEST MAY 3, 1973

By /s/ Raymond D. Hewitt
Deputy

Filed and entered November 15, 1972

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 72-1479

[Filed, Dec. 13, 1972, Dennis R. Mathews, Clerk, U.S. Court of Appeals]

ROBERT EDWARD MARSHALL, PLAINTIFF-APPELLANT

vs.

J. J. PARKER, Warden, UNITED STATES OF AMERICA, DEFENDANTS-APPELLEES

ORDER

It is ordered that the following footnote be added to the opinion in the above-entitled case at page 6, line 12 from the bottom of the page, following the words "public expense":

> We recognize that there is a constitutional right to treatment for persons involuntarily committed to a public hospital where Congress has provided the means to effectuate this treatment. *Rouse* v. *Cameron*, 373 F.2d 451 (D.C.Cir. 1966). We also note that where an institution is providing a treatment program, one held in noncriminal custody may not be denied the right to treatment. *Martarella* v. *Kelley*, 41 U.S.L.W. 2230 (S.D.N.Y. Oct. 16, 1972).

This order is not to be officially published.

SUPREME COURT OF THE UNITED STATES

No. 72-5881

ROBERT EDWARD MARSHALL, PETITIONER

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

February 26, 1973

☆ U. S. GOVERNMENT PRINTING OFFICE: 1973 504126 681